IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 312

UNITED STATES, PETITIONER

v.

WILLOW RIVER POWER COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

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OPINION BELOW

The opinion of the Court of Claims (R. I, 21–25) is reported in 101 C. Cls. 202.

STATEMENT OF FACTS

Because the Government's statement of facts has woven throughout its fabric misapprehension of the facts or the conclusions to be drawn therefrom, it will simplify presentation here if the facts as the record supports them are set forth at length. Where actual clash in the two statements appear, our statement sets forth these facts in black face type.

Respondent is a public utility company incorporated under Wisconsin laws and operating a small utility plant in and in the

vicinity of Hudson, Wisconsin, a city of about 3,000 people, located at the confluence of the St. Croix and Willow Rivers. The St. Croix River is navigable (R. I, 17, 19). The Willow River is not (R. I,. 23). As stated by the Government, the St. Croix River resembles a lake in the vicinity of Hudson. The area showing the St. Croix River and the Willow River in the immediate vicinity is shown in Exhibit 2.

The respondent maintains four dams on the Willow River, a small Wisconsin stream only about 40 miles long in a straight line and 70 miles long if we follow the meandering course of the stream. It has a drainage area of only 263 square miles (Exh. JJ, p. 8, Par. XIX, Item 8). The lower of the four called St. Croix Dam is involved here. This dam was authorized by Chapter 122, Private and Local Laws of Wisconsin, 1866, (Exh. 6), and the charter was amended by Chapter 15, Private and Local Laws of Wisconsin, 1872, by extending to the particular dam so erected the provisions of the Mill and Mill Dam Act, Chapter 56, Wisconsin Statutes, 1858. The dam, of course, has been maintained ever since 1866 under this authority and has therefore existed by virtue of legislative authority of the State of Wisconsin and its rights are fixed by the decisions of its courts, as will appear herein.

The dam in question was created by building a fill and a gate across the Willow River channel (Exh. 7) and then cutting a new channel over respondent's fast land. This land was a strip of high fast land owned by respondent along the bank of the St. Croix River and was from 125 to 150 feet wide. The former channel of the Willow River flowed close to this land before the channel was filled (Exh. A).

Into the new channel many years ago respondent's predecessors built the generating equipment constituting the dam involved in this suit. It consists of a power house containing two generators (R. II, 42), a spillway with regulating tainter gates, and flash walls on either side. All this equipment was located on

respondent's land (R. I, 19, Exh. A, Exh. E–2, Exh. 23, Ans. R. I, 11–12, Par. 4).

Ordinary high water in the St. Croix River was elevation 672 feet m. s. l. (R. I, 20, Par. 5). At this level respondent's dam had an operating head of 17 feet, that is, 17 feet of respondent's total head of 22½ feet were above ordinary high water mark (R. I, 21, Par. 5). When the so-called Red Wing Dam in the Mississippi River was built to improve navigation in the Mississippi and St. Croix Rivers and completed in 1938, the level of the St. Croix River was raised slightly more than 3 feet above ordinary high water mark, that is, to elevation 675.3 m. s. l. (R. I, 24). The result was that after the Red Wing Dam was erected, respondent's head was reduced to slightly under 14 feet. Respondent's property was devoted to the use and operation of this dam. The fast land helped to confine the pool and the dam to generate the power. As indicated in appellant's brief (p. 5), the power output of the dam was dependent upon the operating output of this dam, and when the power output was decreased the unit constituting the generating equipment as well as the land used in connection with it were damaged accordingly.

Even though denied by the Government it is nevertheless indisputable that in the St. Croix River above elevation 672 feet m. s. l. and to elevation 675.3 feet m. s. l., the Government, of course, took all of respondent's land between these elevations (R. II, 42). That is illustrated also by Exhibit 22 showing the light areas along either side of the dam and power house. At the time that picture was taken the elevation in the pool was 672.1 feet m. s. l. (R. II, 47, q. 575, 577, R. II, 48, q. 586–588).

The pictures in Exhibit 22 were taken on March 6, 1940, while the pool was drawn down from November, 1939, to April 1, 1940, to permit the cutting of timber between ordinary high water mark and the pool level elsewhere on this flowage.

Issue was joined in this case and the case was tried by the Government upon the theory that the Willow River like the St. Croix River was navigable. Thus the Government's answer said:

> "Defendant admits that along the course of the Willow River the plaintiff has developed several integrated and synchronized water power sites by construction of dams at such sites, one of which is located near the point where the Willow River discharges into the St. Croix River upon property more particularly described in Paragraph 4 of the petition." (R. I, 11, Par. 4)

And again said:

> "Further answering, the defendant states and shows unto the Court that the dam so constructed by the plaintiff *near* the point where the Willow River discharges into the St. Croix River (or Lake St. Croix) *was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream, and said foundation now rests upon the bed of said stream below the ordinary high water elevation thereof;* that by such construction and the erection of tainter gates thereon and thereover, the water of Willow River has been dammed and caused to be artificially held back, so that its elevation since the erection of said foundation and tainter gates is approximately 22 feet above its natural elevation, in consequence of which commerce and navigation between points on the Mississippi River, by way of Lake St. Croix, and points on Willow River can no longer be carried on because of the obstruction to navigation said dam interposes, and as a further consequence the Mississippi River, of which Willow River is tributary-feeder, has been deprived of the free, natural, and unimpeded flow of water from said Willow River." (Emphasis supplied) (R. I, 12)

The case was tried upon that theory and no claim was asserted, expressly or otherwise, but that the St. Croix Dam was located outside of the St. Croix River. That defense was still the theory

of the Government when it appealed to this Court, for it assigned as error that the Court of Claims had erred in finding the Willow River was non-navigable. That defense was abandoned by stipulation after this Court took jurisdiction (R. II, 49–50). The Court of Claims found:

> "The plaintiff, Willow River Power Company, is a public utility company of the State of Wisconsin. During the times here involved it developed electric power hydraulically and by other means and sold it to the surrounding community. Its power plant was located *near* the confluence of the Willow River and the St. Croix River, in the City of Hudson, Wisconsin, *on land owned by it above ordinary high water of the St. Croix River.*" (Emphasis supplied) (R. I, 19, Par. 1)

Another issue vigorously contested at the trial was the claim that ordinary high water mark was not 672 feet m. s. l. claimed by respondent and found by the Court of Claims (R. 120, par. 5), but 676 feet m. s. l. (R. I, 24), claimed by the Government. The issue raised on this appeal is an afterthought so far as location of respondent's dam is concerned. It was raised inferentially for the first time in the fifth assignment of errors. No pretense appears in the record that the Government ever requested any finding in the Court of Claims confirming its claim here that any part of respondent's dam was located in any part of the St. Croix River.

The Court found ordinary high water mark to be 672 feet m. s. l. That finding is not disputed here. The Court also found that the head of respondent's dam above ordinary high water mark was 17 feet and that by the operation of the Red Wing Dam this head was reduced to slightly under 14 feet (R. I, 21). Upon completion of the Red Wing Dam, the head on that dam created backwater for more than 30 miles above the dam. That, of course, was the philosophy of improvement in order that navigation upon both the Mississippi and the St. Croix Rivers might be improved. In so backing up the water, it raised the water in the St. Croix River to 675.3 feet m. s. l. at Hudson. The effect of this increase

in elevation between 672 feet m. s. l. found by the Court as ordinary high water, and 675.3 feet m. s. l., the elevation of the Red Wing pool at Hudson, is graphically illustrated by Exhibit 23, Photo 594, made March 6, 1940, when the pool had been lowered as indicated above to elevation 672.1 feet m. s. l. (R. II, 47, q. 576, Exh. 14, 15, 16; Nov. to Mar., 1940, hydrographs; Exh. 23). As indicated by Exhibit 23, "the normal pool stage which is about 3 feet *above the stage shown was very evident in the water mark along the dam tailrace and shoreline*" (light areas) (Emphasis supplied). Examination of this exhibit (Exh. 23) also shows that the respondent's dam is well outside the water line of the St. Croix River even when the St. Croix River is at ordinary high water mark, which the Court found one-tenth of a foot lower than the stage shown on Exhibit 23. The same fact appears from Exh. E–2 in this record. The water line at stage 675.3 m. s. l. is also shown on Photo 593 of this exhibit and on Exhibit 22 (both pictures). On Photo 591, Exhibit 22, the wing wall is shown in line with the mainland. A similar condition is shown by "south elevation" on Exhibit 8 and is also indicated on Exhibit E–2. Here again the land is shown to extend out considerably beyond the power house and appurtenant structures. Exhibit 8 was made June, 1942, when the water elevation ranged between 675 to 682 feet m. s. l. (Exh. 15, gauge heights 1942 at Prescott. The same is illustrated by Exhibits 14 and 16 gauge heights at Stillwater and Hudson).

It is also claimed that the draft tubes in this dam had been extended out into the St. Croix River. This is not supported by the evidence in the record (R. II, 39, q. 203). The testimony was only that when the draft tubes had to be extended at a time when Lake St. Croix was below elevation 666 m. s. l., the draft tubes had to be extended "down to a lower level". It was merely, however, for the apparent temporary purpose of furnishing draft while the water was at the extremely

low elevation, the lowest in the history of operation of the dam. (R. II, 39, q. 204) The Government made no effort at that time and in no manner indicated that it was material to the Government where the draft tubes were located. It is only by inference now that they attempt to say that the draft tubes were either in the St. Croix River or extended to the St. Croix River, as claimed in the Government's brief. No finding or suggested finding has been produced by the Government to indicate that it advised the Court of Claims or advised respondent of a change in its theory of this case as set forth in its answer to the effect that the Willow River dam was located entirely across the Willow River and was in no manner located within any part of the St. Croix River. The evidence in any event all entirely negatives such a conclusion.

As a result of the loss of 3 feet of head, the respondent was forced to obtain additional power from a new source, the cheapest available source, that is by purchase from Northern States Power Company. The additional cost of this energy compared with the cost of generation at the St. Croix dam was capitalized to establish the damages (R. 348–354). The Government did not dispute the amount of the damages or the method of arriving at them. It offered no evidence on the issue. Although the damages were thus established to be $80,000, the Court of Claims, "by way of a jury verdict", assessed the damages at $25,000 plus interest at 4½% from August 12, 1938, to date of payment of the judgment (R. I, 21, 25, 32). No issue is raised here as to the amount of the damages or the method of arriving at them.

QUESTIONS PRESENTED

There is presented here in fact only one question: In a case where a dam is built across a non-navigable stream and upon fast land owned by the owner of the dam, may such owner recover damages for the taking of so much of the dam as is above ordinary high water mark?

ARGUMENT

I. ISSUES ON APPEAL

Prior to the passage of 53 Statutes 752, Act of May 22, 1939, Chapter 140, only questions of law were reviewable by this court.

Niles-Bement-Pond Co. v. U. S., 281 U. S. 357; (1930)
Luckenbach SS Co. v. U. S., 272 U. S. 533; (1926)
U. S. v. Omaha Tribe of Indians, 253 U. S. 275; (1920)

By the Act of May 22, 1939, the scope of review is expanded to include the following:

> "* * * there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."
>
> Federal Code Annotated, Vol. 8, Title 28, Sec. 288, as amended May 22, 1939, Chapter 140, 53 Stat. 752.

The appellant's brief does not indicate that it relies upon any part of this statute. With the possible exception of Assignment No. 5, the Assignments of Error do not indicate any attempt to attack the court's findings or the sufficiency of its findings. The record also shows clearly that no findings were requested on any issue claimed material now. Nor is it argued that there was lack of substantial evidence or that for any reason the ultimate findings are not sustained. Any indication of any attack upon the court's findings is absent in the brief here. Instead, however, claims as to what the evidence shows are made either without support from the record or in actual conflict with the record, and the argument then proceeds as if based upon a finding or upon undisputed fact. Under the circumstances, we submit the issues

on this appeal must now be decided upon the findings which cannot be contradicted, and that therefore the issues here are purely propositions of law based upon the findings of the Court of Claims and related only to issue as to the right of recovery for a "taking" above ordinary high water mark."

II. THE LAW UNDERLYING THE ISSUES IN THIS CASE

Before proceeding to the argument in this case, it may be helpful to limit the discussion by concessions as to the law to be applied to the facts in this case. This will answer in a large degree the brief of appellant.

Within the bed of the St. Croix River as a navigable stream, being the area below ordinary high water mark, the owner of the shore has title under Wisconsin law.

Kaukauna Co. v. Green Bay, etc. Canal Co., 142 U. S. 252, 272; (1891)

Wisconsin River Improvement Co. v. Lyons, 30 Wis. 61; *Merwin v. Houghton*, 146 Wis. 398, 409; (1911)

This title in the area below ordinary high water mark, however, is a qualified title subject to the dominant power of the United States.

U. S. v. C. M. St. P. & Pac. R. R. Co., 312 U. S. 592; (1941)

U. S. v. Chandler-Dunbar Co, 229 U. S. 53, 62; (1913)

Fox River Co. v. R. R. Commission, 274 U. S. 651; (1927)

"The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject."

U. S. v. C. M. St. P. & Pac. R. R. Co., 312 U. S. 592; (1941)

Property, however, above ordinary high water mark is not subject to any similar servitude, and when such property is taken by the Government the owner is entitled to compensation.

U. S. v. Chandler–Dunbar Co., 229 U. S. 53, 60, 65; (1913)

Likewise when there is a taking in a non-navigable stream by backing water from the navigable stream into the non-navigable stream, there is a taking for which compensation must be rendered.

U. S. v. Cress, 243 U. S. 316, 329–330; (1917)

There is a taking by flooding a part of any property above ordinary high water mark to the extent of the flooding.

U. S. v. Grizzard, 219 U. S. 180, 183; (1910)
Bauman v. Ross, 167 U. S. 548; (1896)

So:

> "It is not always an absolute taking of land which constitutes a taking of private property for public use * * * 'a serious interruption to the common and necessary use of the property may be equivalent to a taking of it'."
>
> *Jackson v. U. S.*, 31 Ct. of Cls. 318, 321;
> *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; (1884)
> *U. S. v. C. B. & Q. R. R. Co.*, 82 F. (2) 131, 133, 136; (1936) Cert. Denied 298 U. S. 689.

And so it was said in *Gibson v. U. S.*, 166 U. S. 269, 276 (1896), reaffirming *Pumpelly v. Green Bay Co.*, 13 Wall. 166:

> "It was held that the permanent flooding of private property may be regarded as a 'taking'. In those cases there was a physical invasion of the real estate of a private owner and a practical ouster of possession."
>
> *Gibson v. U. S.*, 166 U. S. 269, 276.

And:

> "Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated but the damage to the remainder resulting from that taking embracing, of course, injury due to the use to which the part appropriated is to be devoted."
>
> *U. S. v. Grizzard*, 219 U. S. 180 (1910).

Likewise it has been said that:

> "*It is the* character of the invasion, not the amount of the damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking."
>
> *U. S. v. Cress*, 243 U. S. 316, 328–329; (1917)
> *U. S. v. C. B. & Q. R. R. Co.*, 90 Fed. (2) 161, 171. Cert. Denied 298 U. S. 689; (1937)
> *U. S. v. Great Falls Mfg. Co.*, 112 U. S. 645; (1884)
> *Hurley, Sec. of War, v. Kincaid*, 285 U. S. 95; (1932)

The law of Wisconsin with respect to the rights of a property owner in non-navigable streams vests in such property owner the title to the bed of the stream and he may not be deprived of his improvements therein without being paid just compensation.

The Legislature of Wisconsin has defined navigable streams, Statutes of 1858, Chapter XLI, Sec. 2, which provides:

> "All rivers and streams of water in this state, in all places where the same have been meandered, and returned as navigable by the surveyors employed by the United States government, are hereby declared navigable to such an extent that no dam, bridge, or other obstruction may be made in or over the same, without the permission of the legislature: *provided*, that nothing herein contained shall be construed so as to affect any act now in force granting to towns, or county boards of supervisors, the power to erect or authorize the construction of bridges across such streams."

The Mill Dam Act, also part of the Statutes of 1858, Chapter LVI, Sec. 1, provided that:

> "Any person may erect and maintain a water mill, and a dam to raise water for working it, upon and across any stream that is not navigable, upon the terms and conditions, and subject to the regulations, hereinafter expressed."

In the instant case the stream was not meandered by the Government (R. I, 23), and the improvement here was made with legislative authority and thereafter recognition was given that under this authority rights under the Mill Dam Act arose (Chapter 122, Private and Local Laws of Wisconsin, 1866 (Exh. 6), Chapter 15, Private and Local Laws of Wisconsin, 1872). Under those circumstances the Wisconsin court has held that those who make improvements in streams of this kind under authority of law acquire property rights which cannot be divested without compensation.

A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652, 656; (1889)

McDonald v. Apple River Power Co., 164 Wis. 450, 454; (1916)

Charnley v. Shawano Water Power & River Improvement Co., 109 Wis. 563, 569 (1901).

This is also the law in the Federal courts.

Scranton v. Wheeler, 79 U. S. 141 at 146; (1900)

Monongahela Navigation Co. v. U. S., 148 U. S. 312 (1893).

And;

> "The nature and extent of the rights of the state and of riparian owners in navigable waters within the state and to the soil beneath are matters of state law to be determined by the statutes and judicial decisions of the states."
>
> *Fox River Paper Co. v. R. R. Com.*, 274 U. S. 651, 655. (1927)

The law in Wisconsin has been summarized in this manner:

> "The rule of law as to the right of a riparian owner, respecting the flow of water over his land, is indicated in the authorities cited by counsel. The same principle has recently received direct sanction from the House of Lords, as follows: 'It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturoe*, belongs to the proprietor of the adjoining lands as a natural incident to the right to the soil itself, and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbor's soil for his own in its natural state. *North Shore R. Co. v. Pion*, L. R., 14 App. Cas. 621."
>
> *Kaukauna Water Power Company v. Green Bay & Mississippi Canal Company*, 75 Wis. 385, 390 (1890).

With greater reason, of course, do the laws of the states govern the rights in streams not navigable.

III. THE DAMAGES HERE WERE THE RESULT OF A TAKING OF RESPONDENT'S FAST LANDS WHICH INCLUDED PART OF THE DAM AND GENERATING FACILITIES. THIS DAM AND FACILITIES WERE THE ELEMENTS TO WHICH THE ENTIRE VALUE OF RESPONDENT'S ENTERPRISE ATTACHED AND THEREFORE DETERMINED RESPONDENT'S DAMAGES

The argument of appellant proceeds from two misconceptions, i.e., (1) as to the facts, and (2) as to the law as applied to the record in this case.

As indicated above, the Government throughout its case before the Court of Claims claimed the dam in question was located

within the Willow River (this brief, 3- to 4-). The general rule almost universally applied is that "the allegations, statements and admissions contained in the pleading are conclusive as against the pleader".

49 C. J. 122, Note 55.
Davis v. Wakelee, 156 U. S. 680, 689; (1895)

While in this case the Government in a sense did not succeed in convincing the Court of Claims that the Willow River was navigable, it permitted its answer to stand before the trial and after judgment without a protest until for the first time in this Court it seeks to change its position and to claim that the St. Croix Dam rests in the St. Croix River. Under the authorities, such a change of position should not be permitted.

It changed that position only after this appeal was taken but it supports the claim only by asserting two insignificant parts of the dam were located in the St. Croix River, one, the draft tubes and two, a guide wall. The Court of Claims found expressly that the dam was located upon respondent's fast land (R. I, 19). It made no exceptions. Thus it said:

> "Its (respondent's) power plant was located *near* the confluence of the Willow River and St. Croix River * * * *on land owned by it* (respondent) above ordinary high water of the St. Croix River." (R. I, 19)

Exhibits E–2, 22 and 23 illustrate the correctness of this finding. Exhibit 22, with the water one-tenth of a foot above ordinary high water mark, shows plainly that the guide wall is within the line of the land on either side. Exhibit E–2 confirms this conclusion. It was taken with the water at elevation 676.1 m. s. l. (R. II, 38–39). As to the wing wall, the only evidence relied upon was that of Rodger Hooper based upon investigations in June, 1942 (the exact date in June is not fixed), but during that month the water ranged from 675 feet to 681 feet m. s. l. (Exh. 14, 15, 16).

In other words, it was 3 feet above ordinary high water mark or higher. The witness described the wall as extending out 34 feet from the "west face of the power house" (R. II, 46, q. 92). These walls extended "towards the river" (R. II, 46, q. 88). He also spoke of the walls resting in the "bottom of the river" (R. II, 46, q. 94, 98). What river is not clear and was not material at the time of trial in view of the attitude of the Government that both rivers were navigable. He did say, however, that "the water was flooding out the west edge of the company's property" (R. II, 46, q. 87).

What is clear, moreover, is that the witness was discussing a situation as he found it in June, 1942, when the river encroached upon respondent's property a great deal more than it did at ordinary high water as is shown by Exhibit 22. The witness did not testify as to conditions in the light of ordinary high water nor did he testify as to the necessity of this guide wall as an adjunct to or part of the power development. In this connection it is also significant that the meander line shown on Exhibit 7 extends out as much as 50 feet into the water from respondent's dam in 1942 when this map was made. (This is based upon the scale of the map applied to the area in question.) The meander line determined conditions at the time of survey; it then marked the bank as it existed and determined the amount and quantity of the land sold by the Government. By specific instructions to surveyors, "*meander lines* will not be established at the segregation line between dry and swamp lands, but *at the ordinary high water mark of the actual margin of rivers or lakes*", etc. (Emphasis supplied) (Par. 154, P. 162, Manual of Surveying Instructions, U. S.).

Hardin v. Jordan, 140 U. S. 371, 380. (1891)
R. R. v. Schurmeir, 7 Wall. 272.
Courtfield v. Smyth, (Ore.) 138 Pac. 227.
Johnson v. Knott, 13 Ore. 308.

With reference to the draft tubes, it is claimed that these extended into the St. Croix River. There is absolutely no evidence of this. Respondent's witness Schultz testified merely that on one occasion when the water in the St. Croix River was below elevation 666 feet m. s. l. "we had to extend them (the draft tubes) *down* to a lower level" (R. II, 39, q. 203). That was at a time when the water was the lowest that the witness had any definite knowledge of (R. II, 39, q. 204). It does not appear whether this was a temporary extension. Certainly it was to adapt the operation to a most unusual situation. Examination of Exhibit 22 and E–2 will disclose, however, that the dam and the generating facilities are located well inside of the embankments on either side and the tubes were "the water wheel draft tubes".

No claim was made in connection with this evidence nor was any evidence introduced to supplement the same to indicate that the Government claimed the draft tubes in question extended into the St. Croix River. In fact, in the instant brief apparently the Government confuses its own position in various parts of its brief. Thus, while in its earlier argument it asserts respondent's dam is located in the navigable St. Croix River, at page 16 it says, "*As here* the plaintiff in the Cress Case owned a dam located in a *non-navigable* tributary of a navigable waterway" (Emphasis supplied).

Thus it appears that the evidence clearly bears out the finding of the lower court that the dam was located upon respondent's land. That, even in a proper case, ends this court's function upon a review of the facts supporting the lower court's findings since its function on appeal is a limited one. (Fed. Code Ann., Vol. 8, Title 28, Sec. 288, 53 Stats. 752).

From the error as to the facts, counsel then proceed to argue that respondent can have "no private property rights in the flow of a navigable stream as against the paramount right of the United States to improve navigation". We admit that, but it is of course apparent that this has no significance in a consideration

of this case and the cases cited (p. 12–14) bear out no more than the proposition that up to ordinary high water mark within the bed of a navigable stream, private property is subject to the paramount right of the Federal Government to improve the stream for navigation and to use the facilities within that bank up to ordinary high water mark for this purpose.

We confess that when the complaint in this action was filed on February 6, 1940 (R. I, 3), we were proceeding under the same theory advanced in *United States v. Chicago, Milwaukee, St. Paul and Pacific R. R. Co.*, 312 U. S. 592 (1941), relying upon earlier decisions of this court. But when the decision in the *Milwaukee Case* was announced on March 31, 1941, we adapted our proof in this case to the elements of damage resulting from the appropriation of property above ordinary high water mark. The evidence in this case was not taken until June, 1942, and the court's findings carefully confirm the damage to that above ordinary high water.

On page 14 of the brief, the statement is made, "But ordinary high water mark has no relevancy where the damages complained of are changes in the flow of the river, not the flooding of land". In the footnote it is claimed that no claim was made that the raising of the water level "flooded fast lands or caused any physical injury to its power plant". The testimony is undisputed that fast lands were flooded. It is shown by the Government's own exhibits (Exh. 22 & 23) and the testimony of witness Hooper (R. II, 45–46). The pictures in Exhibit 22 show the physical evidence of it. Common knowledge as to the action of water, of course, would leave no doubt of such a result. But the Government was not satisfied with specifically showing this fact. On cross-examination of the witness Schultz (R. II, 42–43) it, of course, is made perfectly plain what would be obvious from a knowledge that the water was raised that what took place here was a dispossession of the respondent and an appropriation by

the appellant of fast lands and a destruction of the generating capacity of part of the dam. (See also R. II, 48, q. 586–589.) That constitutes a taking within the cases cited above, pp. 10 to 11, and creates the implied promise on the part of the Government to pay therefor.

This dam, as indicated by the findings of the Court, was located in a non-navigable tributary of the St. Croix River just as in *United States v. Cress*, 243 U. S. 316, relied upon by the Court of Claims, and for the same reason the respondent is entitled to damages for what was taken above ordinary high water mark.

If in the instant case in constructing the dam Respondent had only excavated its own fast lands to elevation 672 feet m. s. l. and built its generating plant as here, and thereupon the Government had completed the Red Wing dam and raised the water to elevation 675 feet m. s. l., taking as here 3 feet of the dam, can there be any doubt as to the taking and the right of recovery of damages which would be the same as now? The fact that respondent excavated its own land to below elevation 672 feet m. s. l. and then built its dam should not change the principle.

We will not burden the court with a detailed analysis of the cases. Most of them deal with structures within navigable rivers or with conditions below ordinary high water mark (App. Br., pp. 13–15). The cases are in point only upon the wholly erroneous and unsupported assertions as pointed out above that this dam was located within a navigable river. For this reason the frequent reference to the "flow of the navigable river" to which we make no claim is wholly beside the point.

With some apology, because we regret the necessity of repetition but it is made necessary by the method in which the subject is treated in the Government's brief, we call attention to the fact that the Court of Claims found only that the "levels" of the Willow River were not affected (R. I, 20, par. 5). Obviously

this was true because the elevation of the St. Croix River was only 675.3 feet m. s. l. after the erection of the Red Wing dam, while the elevation of the Willow River at the St. Croix Dam was 689 feet m. s. l. (That is, 17 feet higher than ordinary high water, or 672 feet m. s. l. plus 17 feet.) (R. I, 21) The Court of Claims did not find, as asserted in appellant's brief (p. 17) "that the *flow* of the non-navigable stream (Willow River) is not altered" (emphasis supplied). (Compare R. I, 20–21, par. 5) The philosophy of the footnote on page 17 seems self-destructive.

What is said concerning rights of respondent in Willow River (App. Br., pp. 18–19) under Wisconsin law is applied to a river requiring legislative approval. The Willow River by express legislative action in 1872, Chapter 15, Private and Local Laws of 1872, was made subject to rights under the Mill Dam Act and required no legislative sanction for the erection of dams because it was not deemed to be navigable.

See *Allaby v. Manston Electric Service Co.*, 145 Wis. 345, 349, 351 (1908).

McDonald v. Apple River Power Co., 164 Wis. 450 (1916).

A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652, 656 (1889).

Moreover *Falls Mfg. Co. v. Oconto River Improvement Co.*, 87 Wis. 134 (1894), cited in appellant's brief, is distinguishable also because in that case the legislative authority required maintenance of a log chute as part of the dam, and the Oconto River was recognized by the Federal Government as navigable by the grant of special authority for its improvement.

IV. SINCE THE FLOODING OF THE PROPERTY ABOVE ORDINARY HIGH WATER MARK CONSTITUTES A TAKING AND THE CLAIM HERE IS ONLY FOR A TAKING ABOVE ORDINARY HIGH WATER MARK, THE ARGUMENT (P. 22–28 OF GOVERNMENT'S BRIEF) FAILS

The argument of the appellant carries its own answer. Certainly it is not supported by the cases cited.

We repeat again the Court of Claims only awarded damages for a taking above ordinary high water mark. It cannot be questioned that above ordinary high water mark "the right to have the water (of a non-navigable stream) flow away from the mill dam unobstructed except as in the course of nature" has not been questioned to this date.

U. S. v. Cress, 243 U. S. 316, 318 (1917).

This case was carefully reviewed by this court in *U. S. v. C. M. St. P. & P. R. R. Co.*, 312 U. S. 592 (1941). As a result *U. S. v. Lynah*, 188 U. S. 445 (1903), was overruled only to the extent it allowed damages for a taking below ordinary high water mark. *U. S. v. Cress*, 243 U. S. 316 (1917), was not overruled. It was accepted as governed by the limitations placed upon *U. S. v. Lynah*, 188 U. S. 445 (1903). We believe likewise the conclusions of the court as to issues referred for retrial evidences an accepted concept that by *U. S. v. C. M. St. P. & P. R. R. Co.*, 312 U. S. 592 (1941), no other changes in the law were justified.

Nor do the cases (cited p. 23) sustain appellant's argument. Thus the *Cress Case*, 243 U. S. 316, recognizes the right of a riparian to use a non-navigable stream and in using it to have the water flow away from it "as in the course of nature". That means that the lower riparian cannot block the stream from the upper riparian and thereby take his property.

U. S. v. Rio Grande D. & I. Co., 174 U. S. 690 (1899), says that this reciprocal right applies between persons having rights

in the navigable stream and those having corresponding rights in the non-navigable stream, and so this Court said that:

> "In the absence of specific authority from Congress a state cannot by its legislation destroy the right of the United States, *as the owner of lands bordering on a stream,* to the continued flow of its waters". (Emphasis supplied) (703)

And likewise, as a reciprocal right the owner of property on the non-navigable stream may not so use the water in that stream as to interrupt the navigability of the navigable stream below him. (703) But that right is no greater and no different than the right of any lower riparian. It imputes no more than the language giving the riparian the right to have the waters of the river flow "as in the course of nature". Any lower riparian may demand that right, but he obtains neither the right to destroy the dam of the upper owner nor to flood it out by his own dam. He has merely the right to compel the upper owner to permit the water to flow in the stream so as not to destroy it. As indicated, these rights are "corresponding" or "reciprocal". That creates no right of the lower owner to take what belongs to the upper owner unless he pays for it.

And so while the Government "may resort to all means for the exercise of a granted power", (*Oklahoma v. Atkinson Co.*, 313 U. S. 508, 534 (1941)), and in the improvement or protection of navigation may control the flow of non-navigable streams as any other lower owner or anyone else having a right to the unobstructed flow of a stream may do, it may not appropriate and therefore "take" without paying compensation for private property for such a project except in the single case where the property is located in the "bed" of the navigable stream. This Court in *Oklahoma v. Atkinson Co.*, 313 U. S. 508 (1941), was quick to stress that in that case "there is no complaint that any property owner will not receive just compensation for the land taken." (534)

U. S. v. Utah, 283 U. S. 64 (1931), has no application on the peculiar facts. The United States was suing as an owner of the lands along the non-navigable stream involved. It prevailed only to that extent (90). *U. S. v. Powelson*, 319 U. S. 266 (1943), sustains the right to recover for property taken on and in a non-navigable stream.

V. THE DAMAGES ARE NOT CONSEQUENTIAL. (GOVERNMENT'S BRIEF, pp. 28–31)

It is apparent, of course, that here there was a "physical invasion of respondent's real estate" and an ouster of his possession to the extent of such invasion.

Transportation Co. v. Chicago, 99 U. S. 635, 642. (1878)

Part of that real estate was the generating equipment which had been built into and completely incorporated as a part of the real estate. The damage was substantial, and appellant's brief fails to point out why the taking here is any different from one where a building or other structure or development has been flooded above ordinary high water mark to the extent of 3 feet. The cases cited in this brief and conceded by respondent all hold that flooding is "taking", and accordingly require the Government to respond in damages. Nor does the fact that the damages must be measured in terms called the "power potential" of this dam change the nature of this taking. The complete answer to this seems to be that appellant never attacked the method of establishing respondent's damages, it offered no estimate of the amount of damages to contradict that offered by respondent, and has not attacked the Court of Claims' conclusion as to the amount of damages. It is clear that in a case like this measurement of damages must necessarily follow some method that relates the damages to the place where the taking has its real impact. So the embankment, or the flood gates, part of each of which were

taken, can furnish little basis for real appraisal. Combined with them and the real reason for their use were the large generators and related equipment. Together they constituted a unit of respondent's property. Three feet of that unit was taken above ordinary high water mark. The impact of the taking strikes at these generators and their efficiency as part of the unit. Accordingly, the impairment of that efficiency measures the loss in a case like this.

Leonard v. Rutland, 28 Atl. 885, 66 Vt. 105, 109; (1894)
Connecticut Ry. and Lighting Co. v. Palmer, 305 U. S. 493, 494, 503–505; (1939)
Piazzek v. Drainage District, 119 Kansas 119, 124; 237 Pac. 1059–1061; (1925)
Pottawatomie Commissioners v. O'Sullivan, 17 Kansas 58, 60. (1876)

The distinction between consequential damages and actual damages has been frequently pointed out in this court.

Gibson v. U. S., 166 U. S. 269; (1897)
Bedford v. U. S., 192 U. S. 217, 225; (1904)
U. S. v. C. B. & Q. R. Co., 82 Fed. (2) 131, 137–139; (1936). Cert. Denied 298 U. S. 689.
See also *Pumpelly v. Green Bay Co.*, 13 Wall. 166.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 312.—October Term, 1944.

The United States, Petitioner, vs. Willow River Power Company. } On Writ of Certiorari to the Court of Claims.

[March 26, 1945.]

Mr. Justice Jackson delivered the opinion of the Court.

The Willow River Power Company has been awarded $25,000 by the Court of Claims as just compensation for impaired efficiency of its hydroelectric plant caused by the action of the United States in raising the water level of the St. Croix River. Reality of damage and reasonableness of the award are not in issue. Our question is whether the damage is the result of a "taking" of private property, for which just compensation is required by the Fifth Amendment.

Willow River in its natural state was a non-navigable stream, which flowed to within a few rods of the St. Croix River, turned and roughly paralleled it for something less than a mile, and then emptied into the St. Croix. Many years ago an earth dam was thrown across the Willow about a half-mile above its natural mouth. A new mouth was cut across the narrow neck which separated the two rivers and a dam was built across the artificial channel close to or upon the banks of the St. Croix. Here also was built a mill, which operated under the head produced in the pool by the two dams, which obstructed both the natural and the artificial channel of the Willow River.

These lands and appurtenant rights were acquired by the Willow River Power Company, a public utility corporation of the State of Wisconsin, and were devoted to hydroelectric generation for supply of the neighborhood. The plant was the ~~lower~~ of four on Willow River operated by the Company as an integrated system. The power house was located on land owned by the Company above ordinary high water of the St. Croix. Mechanical energy for generation of electrical energy was developed by water in falling from the artificial level of non-navigable Willow River to the natural level of navigable St. Croix River. The elevation

of the head water when at the crest of the gates was 689 feet above mean sea level. The operating head varied because elevation of the tail water was governed by the fluctuating level of the St. Croix. When that river was low, the maximum head was developed, and was 22.5 feet; when the river was at flood stage, the operating head diminished to as little as eight feet. The ordinary high water mark is found to have been 672 feet, and the head available above that was seventeen feet.

The Government, in pursuance of a congressional plan to improve navigation, in August of 1938 had completed what is known as the Red Wing Dam in the upper Mississippi, into which the St. Croix flows. This dam was some thirty miles downstream, but it created a pool which extended upstream on the St. Croix beyond respondent's plant at an ordinary elevation of 675 feet. Thus the water level maintained by the Government in the St. Croix was approximately three feet above its ordinary high-water level at claimant's property. By thus raising the level at which tail waters must flow off from claimant's plant, the Government reduced the operating head by three feet, using ordinary high water as the standard, and diminished the plant's capacity to produce electric energy. The Company was obliged to supplement its production by purchase from other sources.

Loss of power was made the only basis of the award. The Court of Claims found as a fact that "The value of the loss in power as a result of the raising of the level of the St. Croix River by three feet above ordinary high water was $25,000 at the time and place of taking," and it rendered judgment for that amount. There is no finding that any fast lands were flooded or that other injury was done to property or that claimant otherwise was deprived of any use of its property. It is true that the water level was above high-water mark on the St. Croix River banks and on claimant's structures, but damage to land as land or to structures as such is not shown to be more than nominal and accounts for no part of the award. The court held that the Government "had a right to raise the level of the river to ordinary high-water mark with impunity, but it is liable for the taking or deprivation of such property rights as may have resulted from raising the level beyond that point." Turning, then, to ascertain what property right had been "taken", the Court referred to *United States* v. *Cress*, 243 U. S. 316, 329, 330, which it said was identical

in facts, and held it had no option but to follow it and that "It results that plaintiff is entitled to recover the value of the decrease in the head of its dam."[1]

The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision. The court below thought that decrease of head under the circumstances was a "taking" of such a "property right," and that is the contention of the claimant here.

It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests. Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation.

[1] 101 Ct. Cls. 202, certiorari granted, 323 U. S. —.

The claimant's assertion that its interest in a power head amounts to a "property right" is made under circumstances not present in any case before considered by this Court.

Claimant is the owner of lands riparian to the St. Croix River, and under the law of Wisconsin, in which the lands lie, the shore owner also has title to the bed of the stream. *Kaukauna Co.* v. *Green Bay Canal Co.*, 142 U. S. 254, 271; *Jones* v. *Pettibone*, 2 Wis. 308; *Willow River Club* v. *Wade*, 100 Wis. 86. The case seems to have been tried on the theory that the Company may also claim because of interference with its rights as a riparian owner on the Willow. But the Government has not interfered with any natural flow of the Willow past claimant's lands. Where it was riparian owner along Willow's natural channel claimant already had created an artificial level much above the Government level. If claimant's land along the Willow was at all affected it was at the point where the land was riparian to the artificial channel, just back of the shore line of the St. Croix, where the land had been cut away to install the dam and power plant and to utilize the advantages of being riparian to the St. Croix. We think the claimant's maximum and only interest in the level of the St. Croix arises from its riparian position thereon and is not helped by the fact that its utilization of riparian lands on the St. Croix involves conducting over them at artificial levels waters from the Willow.

The property right asserted to be appurtenant to claimant's land is that described in *United States* v. *Cress*, 243 U. S. 316, 330, as "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature" and held in that case to be an "inseparable part" of the land. The argument here is put that the waters of the St. Croix were backed up into claimant's tail race, causing damage. But if a dyke kept the waters of the St. Croix out of the tail race entirely it would not help. The water falling from the Willow must go somewhere, and the head may be preserved only by having the St. Croix channel serve as a run-off for the tail waters. The run-off of claimant's water may be said to be obstructed by the presence of an increased level of Government-impounded water at the end of claimant's discharge pipes. The resulting damage may be passed on to the Government only if the riparian owner's interest in "having the water flow away" unobstructed above the high-water line is a legally protected one.

The basic doctrine of riparian rights in flowing streams prevails with minor variations in thirty-one states of the Union.[2] It chiefly was evolved to settle conflicts between parties, both of whom were riparian owners. Equality of right between such claimants was the essence of the resulting water law. "The fundamental principle of this system is that each riparian proprietor has an equal right to make a reasonable use of the waters of the stream, subject to the equal right of the other riparian proprietors likewise to make a reasonable use."[3] With this basic principle as a bench mark, particular rights to use flowing water on riparian lands for domestic purposes and for power were defined, each right in every riparian owner subject to the same right in others above and to a corresponding duty to those below.

The doctrine of riparian rights attained its maximum authority on non-navigable streams. No overriding public interest chilled the contest between owners to get the utmost in benefits from flowing streams. Physical conditions usually favored practical utilization of theoretical rights. In general non-navigable streams were small, shifted their courses easily and were not stable enough to serve as property lines as larger streams often do. They were shallow, could be forded and were no great obstacle to tillage or pasturage on two sides of the stream as a single operation. Such streams, like the lands, were fenced in, and while the waters might show resentment by carrying away a few spans of fence in the spring, the riparian owner's rights in such streams were acknowledged by the custom of the countryside as well as recognized by the law. In such surroundings and as between such

[2] The other 17 have some form of the appropriative system. It is based on the principle of priority or seniority, under which rights accrue to users in the order in which they first put waters to beneficial use. The principle is not equal right of use but paramount right in the earlier user. The use is not limited to riparian tracts but may be diverted to sites remote from the stream, thus spreading the benefits beyond riparian lands, a considerable advantage to some arid regions. The beneficial use is more extensive and includes use for irrigation, mining, manufacturing as well as domestic uses, and the water may be permanently diverted and the stream thereby diminished to an extent not allowable under the riparian rights theory. See Bannister, *Interstate Rights in Interstate Streams in the Arid West* (1923) 36 Harv. L. Rev. 960.

[3] Bannister, *supra*, at 960. Choice of the arid sections of the country of the appropriative in preference to the riparian system is cited in Cardozo, Growth of the Law, 118, 119-20 as an example of "conscious departure from a known rule, and the deliberate adoption of a new one, in obedience to the promptings of a social need so obvious and so insistent as to overrun the ancient channel and cut a new one for itself."

owners equality of benefits from flowing waters was sought in the rule that each was entitled to their natural flow, subject only to a reasonable riparian use which must not substantially diminish their quantity or impair their quality. It was in such a stream that this Court found *Cress* as a landowner under the law of Kentucky possessed "the right to have the water flow away from the mill dam unobstructed, except as in the course of nature." 243 U. S. 316, 330.

Cress owned riparian lands and the bed as well of a non-navigable creek in Kentucky. He built a dam which pooled the water and diverted it to his headrace; after it turned the wheel of his mill, it was returned to the stream by his tail race. The Government built a dam in the navigable Kentucky River which backed up the water in this non-navigable tributary to a point one foot below the crest of the mill dam, leaving an unworkable head. The Court concluded that Cress was entitled to compensation as for a taking. It found that Cress had the right as a riparian owner to the natural flow-off of the water in this non-navigable stream. The *Cress* case is significant in that it measured the rights of a riparian owner against the Government in improving navigation by the standard which had been evolved to measure the rights of riparian owners against each other. The rights of the Government at that location were held to be no greater than those of a riparian owner, and therefore, of course, not paramount to the rights of Cress.

We are of opinion that the *Cress* case does not govern this one and that there is no warrant for applying it, as the claimant asks, or for overruling it, as the Government intimates would be desirable. The Government there was charged with the consequences of changing the level of a non-navigable stream; here it is sought to be charged with the same consequences from changing the level in a navigable one. In the former case the navigation interest was held not to be a dominant one at the property damaged; here dominance of the navigation interest at the St. Croix is clear. And the claimant in this case cannot stand in the Cress shoes unless it can establish the same right to have the navigable St. Croix flow tail waters away at natural levels that Cress had to have the non-navigable stream run off his tail waters at natural levels. This could only be done by an extension of the doctrine of the *Cress* case. As we have already said, it "must be confined to the facts

there disclosed." *United States* v. *Chicago, M. St. P. & Pac. R. Co.*, 312 U. S. 592, 597.

On navigable streams a different right intervenes While riparian owners on navigable streams usually were held to have the same rights to be free from interferences of other riparian owners as on non-navigable streams, it was recognized from the beginning that all riparian interests were subject to a dominant public interest in navigation. The consequences of the latter upon the former have been the subject of frequent litigation.

Without detailing the long struggle between such conflicting interests on navigable streams, it may be pointed out that by 1909 the lines had become sharply drawn and were then summarized by a leading author:[4] "The older authorities hold that such an owner has no private rights in the stream or body of water which are appurtenant to his land, and, in short, no rights beyond that of any other member of the public, and that the only difference is that he is more conveniently situated to enjoy the privileges which all the public have in common, and that he has access to the waters over his own land, which the public do not." "Access to and use of the stream by the riparian owner is regarded merely as permissive on the part of the public and liable to be cut off absolutely if the public sees fit to do so." And he quoted another writer of standing:[5] "The owner of the bank has no *jus privatum*, or special usufructuary interest, in the water. He does not, from the mere circumstance that he is the owner of the bank, acquire any special or particular interest in the stream, over any other member of the public, except that, by his proximity thereto, he enjoys greater conveniences than the public generally. To him, riparian ownership brings no greater rights than those incident to all the public, except that he can approach the waters more readily, and over lands which the general public have no right to use for that purpose. But this is a mere convenience, arising from his ownership of the lands adjacent to the ordinary high water mark, and does not prevent the State from depriving him entirely of this convenience, by itself making erections upon the shore, or authorizing the use of the shore by others, in such a way as to deprive him of this convenience altogether, and the injury resulting to him therefrom, although greater than that sustained by the rest of the public, is *damnum*

[4] 1 Lewis on Eminent Domain (3d ed. 1909) 116, 119.

[5] Wood on Nuisances (1st ed.) 592.

absque injuria." On the other hand, the author pointed out, there were cases holding that the riparian owners on navigable streams "have valuable rights appurtenant to their estates, of which they cannot be deprived without compensation." He considered this the better rule, and suggested that the courts indicated some tendency to adopt it.

However, in 1913 this Court decided *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. It involved the claim that water power inherent in a navigable stream due to its fall in passing riparian lands belongs to the shore owner as an appurtenant to his lands. The Court set aside questions as to the right of riparian owners on non-navigable streams and all questions as to the rights of riparian owners on either navigable or non-navigable streams as between each other. And it laid aside as irrelevant whether the shore owner did or did not have a technical title to the bed of the river which would pass with it "as a shadow follows a substance." It declared that "In neither event can there be said to arise any ownership of the river. Ownership of a private stream wholly upon the lands of an individual is conceivable; but that the running water in a great navigable stream is capable of private ownership is inconceivable." 229 U. S. at 62, 69. This Court then took a view quite in line with the trend of former decisions there reviewed, that a strategic position for the development of power does not give rise to right to maintain it as against interference by the United States in aid of navigation. We have adhered to that position. *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 424. The *Chandler-Dunbar* case held that the shore owner had no appurtenant property right in two natural levels of water in front of its lands or to the use of the natural difference between as a head for power production. In this case the claimant asserts a similar right to one natural level in front of his lands and a right of ownership in the difference between that and the artificial level of the impounded water of the Willow River. It constituted a privilege or a convenience, enjoyed for many years, permissible so long as compatible with navigation interests, but it is not an interest protected by law when it becomes inconsistent with plans authorized by Congress for improvement of navigation.

It is conceded that the riparian owner has no right as against improvements of navigation to maintenance of a level below high-water mark, but it is claimed that there is a riparian right to use

the stream for run-off of water at this level. High water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid. But the award here does not purport to compensate a flooding of fast lands or impairment of their value. Lands below that level are subject always to a dominant servitude in the interests of navigation and its exercise calls for no compensation. *United States* v. *Chicago, M., St. P. & Pac. R. Co.*, 312 U. S. 592; *Willink* v. *United States*, 240 U. S. 572. The damage here is that the water claimant continues to bring onto its lands through an artificial canal from the Willow River has to leave its lands at an elevation of 675 instead of an elevation of 672 feet. No case is cited and we find none which holds a riparian owner on navigable waters to have such a legal right. The *Cress* case which the Court of Claims relied upon does not so hold and does not govern here.

Rights, property or otherwise, which are absolute against all the world are certainly rare, and water rights are not among them. Whatever rights may be as between equals such as riparian owners, they are not the measure of riparian rights on a navigable stream relative to the function of the Government in improving navigation. Where these interests conflict they are not to be reconciled as between equals, but the private interest must give way to a superior right, or perhaps it would be more accurate to say that as against the Government such private interest is not a right at all.

Operations of the Government in aid of navigation ofttimes inflict serious damage or inconvenience or interfere with advantages formerly enjoyed by riparian owners, but damage alone gives courts no power to require compensation where there is not an actual taking of property. Cf. *Gibson* v. *United States*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141; *Bedford* v. *United States*, 192 U. S. 217; *Jackson* v. *United States*, 230 U. S. 1; *Hughes* v. *United States*, 230 U. S. 24; *Cubbins* v. *Mississippi River Commission*, 241 U. S. 351. Such losses may be compensated by legislative authority, not by force of the Constitution alone.

The uncompensated damages sustained by this riparian owner on a public waterway are not different from those often suffered without indemnification by owners abutting on public highways by land. It has been held in nearly every state in the Union that

"there can be no recovery for damages to abutting property resulting from a mere change of grade in the street in front of it, there being no physical injury to the property itself, and the change being authorized by law."[6] This appears to be the law of Wisconsin. *Smith* v. *Eau Claire*, 78 Wis. 457; *Walsh* v. *Milwaukee*, 95 Wis. 16; *McCullough* v. *Campbellsport*, 123 Wis. 334; cf. *Smith* v. *Washington*, 20 How. 135; *Transportation Co.* v. *Chicago*, 99 U. S. 635. It would be strange if the State of Wisconsin is free to raise an adjacent land highway without compensation but the United States may not exercise an analogous power to raise a highway by water without making compensation where neither takes claimant's lands, but each cuts off access to and use of a natural level.

We hold that claimant's interest or advantage in the high-water level of the St. Croix River as a run-off for tail waters to maintain its power head is not a right protected by law and that the award below based exclusively on the loss in value thereof must be reversed.

Mr. Justice REED concurs in the result on the ground that the United States has not taken property of the respondent.

[6] 1 Lewis on Eminent Domain (3d ed. 1909) 210.

SUPREME COURT OF THE UNITED STATES.

No. 312.—October Term, 1944.

The United States, Petitioner, *vs.* Willow River Power Company. } On Writ of Certiorari to the Court of Claims.

[March 26, 1945.]

Mr. Justice Roberts.

I think the judgment of the Court of Claims should be affirmed. The findings of fact by that court are supported by the evidence. They are to the following effect.

The St. Croix River is navigable. The Willow River is a non-navigable stream emptying into the St. Croix at Hudson, Wisconsin. The respondent has constructed several dams in the Willow River for the purpose of generating power. The one farthest down stream is "located near the confluence of the Willow River and the St. Croix River in the city of Hudson, Wisconsin, on land owned by [respondent] above ordinary high water of the St. Croix River." At the time of the erection of the respondent's dam, ordinary high water in the St. Croix at Hudson was 672 feet above sea level. The respondent's dam raised the water level in Willow River to a height of 694.5 feet above sea level, thus affording a power head of 22.5 feet.[1]

By the Government's erection of Red Wing Dam the water level in the St. Croix at Hudson was raised to 675.3 feet above mean sea level. The backing up of the water reduced the power head of respondent's dam by approximately three feet, and diminished its supply of power accordingly.

In the court below the United States denied that the Red Wing Dam had raised the level of the St. Croix at Hudson to the ex-

[1] The court's opinion refers to the circumstance that the dam in question is not built across the natural channel of Willow River. Neither the court below nor the Government rely on this phase of the case, and I take it that decision does not depend upon it. The facts are that the St. Croix runs substantially from north to south. Willow River, which runs westward, formerly turned southward a short distance from the St. Croix and substantially paralleled the latter before emptying into it. The respondent dammed the natural channel to form a pool just east of the St. Croix, and then built its power house, dam and spillway at a point at the edge of the pool nearest the St. Croix.

tent claimed by the respondent, and contended that Willow River was a navigable stream and the respondent's dam was, therefore, an obstruction in the navigable waters of the United States for interference with or injury to which the United States was not responsible. These contentions were overruled and are now abandoned. There was no claim by the Government that any portion of the respondent's construction was below ordinary high water mark in the St. Croix. In fact the Government's answer admitted averments of the petition that the dam and power plant were located *near* a point where the Willow River discharges into the St. Croix River, and upon the respondent's property described in the petition. The answer further alleged that the "dam so constructed by the plaintiff *near* the point where the Willow River discharges into the St. Croix River . . . was constructed upon a concrete foundation extending across or occupying the full width of the mouth of a navigable stream" (meaning the Willow River, which the Government then claimed was navigable). The opinion of the court below states that respondent's tail race emptied into the St. Croix River below ordinary high water level, and this seems to be true. But the fact is irrelevant.

The respondent owned the land on either side of the Willow River at and above the point where its dam was constructed. Under the law of Wisconsin the respondent owned the bed of Willow River, and both by common and statute law of Wisconsin it had the right to erect and use the dam.[2] That right was property; and such a right recognized as private property by the law of a state is one which under the Constitution the federal government is bound to recognize. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312; *Fox River Paper Co.* v. *Railroad Commission of Wisconsin*, 274 U. S. 651, 654, 655. Compare *Ford & Son* v. *Little Falls Fibre Co.*, 280 U. S. 369, 375, 377.

Unless *United States* v. *Cress*, 243 U. S. 316, is to be disregarded or overruled, the respondent is entitled to recover for the property taken by the reduction of the efficiency of its dam due to the

[2] Revised Statutes Wisconsin 1858, Chap. XLI, §§ 2, 3; Chap. LVI, § 1; Wisconsin Stats. 1943, §§ 30.01(2)(3)c, 31.07; Wisconsin Laws, Private & Local, 1866, Ch. 122; 1872, Ch. 115; Mabie v. Mattison, 17 Wis. 1; A. C. Conn Co. v. Little Suamico Lbr. Mfg. Co., 74 Wis. 652; Kaukauna Water P. Co. v. Green Bay & M. Canal Co., 75 Wis. 385, 390-391; In re Water Power Cases, 148 Wis. 124; McDonald v. Apple River Power Co., 164 Wis. 450; Apfelbacher v. State, 167 Wis. 233.

raising of the high water mark. If the respondent's power dam had been in Willow River at a distance of one hundred yards or more above the confluence of the two streams, there can be no question that the decision in the *Cress* case would require payment for the injury done to its water power. Since under local law the owner of the land and the dam was entitled to have the water of the non-navigable stream flow below his dam at the natural level of the Willow River, which is affected by the natural level of the St. Croix, the raising of that level by navigation works in the St. Croix invaded the respondent's rights. This is the basis of decision in the *Cress* case. The fact that the respondent's dam is close to the high water mark of the St. Croix River can not call for a different result.

The court concludes that the *Cress* case is inapplicable by ignoring the finding of the trial court that the increase in level of the St. Croix above high water mark has diminished the head of respondent's dam by three feet. But to reach its conclusion the court must also disregard the natural law of hydraulics that water seeks its own level. At the confluence of the two rivers at normal high water of the St. Croix, both the St. Croix and the Willow are at the same level. Any increase in the level of the St. Croix above high water mark must result in raising the natural level of the Willow to some extent. The court below has found that the increase in the level of the St. Croix operates to diminish the head at respondent's dam by the specified amount. The facts thus established are in all relevant respects precisely those on the basis of which this court sustained the recovery of damages in the *Cress* case.

If the fact is that respondent discharges the water from its power plant through a tail race extending below high water mark of the St. Croix, that fact is irrelevant to the problem presented. Respondent claims, and the court below has sustained, only the right to have the flow of the Willow maintained at its natural level. That level has been increased by raising the level of the St. Croix above its high water mark. The increase in the level of the St Croix above high water mark has operated to raise the level below the respondent's dam to an extent which has damaged respondent by diminishing the power head. To that extent re-

spondent has suffered damage and is entitled to recover on principles announced in the *Cress* case.

United States v. *Cress* has stood for twenty-eight years as a declaration of the law applicable in circumstances precisely similar to those here disclosed. I think it is a right decision if the United States, under the Constitution, must pay for the destruction of a property right arising out of the lawful use of waters not regulable by the federal government because they are not navigable.

The CHIEF JUSTICE concurs in this opinion.